Supreme Court, U.S.
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No. 02-1002

In The

Supreme Court of the United States

JOHN NICKLAS, M.D.,

Petitioner,

v.

KIM EAGLE, M.D., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Has Petitioner shown compelling reasons for review where the question presented by Petitioner was not decided by the Court of Appeals for the Sixth Circuit and was not the basis for that Court's ruling?

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COUNTERSTATEMENT OF THE CASE

Petitioner's Verified Complaint ("Complaint") consists of 19 pages and 79 separately numbered paragraphs.[1] However, it totally fails to invoke or even mention the First Amendment.

Petitioner did not mention the First Amendment until he filed his Brief in Opposition to Defendants' Motion to Dismiss. Indeed, Judge Friedman, the district court judge, properly observed in his Opinion and Order: "Plaintiff's Complaint does not mention either 'free speech' or 'First Amendment'" (Appendix C, p. 13a, n.1).

Then, as the Court of Appeals noted, it was not until he reached the Court of Appeals that Petitioner argued "for the first time" that he was relying upon the Petition Clause of the First Amendment (Appendix B, p. 6a).

SUMMARY OF ARGUMENT

Petitioner has not shown the existence of compelling reasons for this Court to exercise its discretion to grant review. In this case the United States Court of Appeals for the Sixth Circuit did not decide the question of whether the "public concern" test is applicable in circumstances where a public employee alleges that his rights under the Petition Clause of the First Amendment have been violated. Rather, the Court of Appeals affirmed the dismissal

[1] Petitioner's Petition states, at p. 2, that a copy of the Complaint is included in the Appendix to the Petition. However, it was not included in the Appendix to the Petition served upon Respondents.

of Petitioner's Complaint and the Judgment for the Defendants on the grounds that Respondents were entitled to qualified immunity. Petitioner has not argued in his Petition that the Court of Appeals for the Sixth Circuit erred in making that ruling and, therefore, has not shown the existence of conflict between its decision in this case and decisions of other Courts of Appeals or of this Court.

Further, *Gable v. Lewis*, 201 F.3d 769 (6th Cir. 2000), which is relied upon by Petitioner, is distinguishable on its facts because: 1) in this case the Complaint does not even mention the First Amendment or the Petition Clause of that Amendment; 2) Petitioner's state court action is not a "petition"; and 3) the plaintiff in *Gable*, unlike Petitioner, was not a public employee. In addition, *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. den., sub. nom. Bongiovanni v. San Filippo*, 513 U.S. 1082, 115 S.Ct. 735, 130 L. Ed. 2d 638 (1995), which is also relied upon by Petitioner, is directly at odds with holdings of seven other Courts of Appeals. In all of those decisions that were decided after *San Filippo*, the Courts of Appeals discussed and then declined to adopt the reasoning of the Third Circuit.

ARGUMENT

I. PETITIONER HAS NOT SHOWN COMPELLING REASONS FOR REVIEW BECAUSE THE QUESTION PRESENTED BY PETITIONER WAS NOT DECIDED IN THIS CASE BY THE COURT OF APPEALS FOR THE SIXTH CIRCUIT AND WAS NOT THE BASIS FOR THAT COURT'S RULING

Petitioner has not shown "compelling reasons" for this Court to exercise its discretion to grant his Petition for a Writ of Certiorari (Sup. Ct. R.10). According to the Petitioner, the question presented for review in his Petition is as follows:

> Does the "public concern" limitation of *Connick v. Myers*, 461 U.S. 138 (1983), under which the First Amendment does not prohibit employer retaliation against a public employee for exercise of free speech rights unless the speech involved a matter of "public concern," apply to retaliation for exercise of the right of access to the courts under the Petition Clause of that Amendment?
>
> (Petition, p. i)

However, the Court of Appeals for the Sixth Circuit did not decide that question in this case. Indeed, the Court of Appeals expressly declined to decide that question:

> Neither is it necessary for us to decide whether, viewing Nicklas' claim as one of retaliation for exercising the right to petition, his claim must be premised on a petition involving matters of public concern.
>
> (Appendix B, p. 7a)

Instead, the Court of Appeals affirmed the dismissal of Petitioner's Complaint pursuant to its ruling in favor of Respondents on their defense of qualified immunity. The Court of Appeals' holding was as follows:

> We hold that because the law was not clearly established at the time, reasonable individuals in the position of these defendants would not have known that the actions of which Nicklas now complains violated his First Amendment right to petition for redress of grievances.
>
> (Appendix B, p. 8a)

Even Petitioner concedes that this was the basis for the Court of Appeals' holding:

> The Court held that the law in the Sixth Circuit was not sufficiently established to avoid a defense of qualified immunity.
>
> (Petition, p. 5)[2]

In the Argument portion of his Petition, Petitioner does not argue that the Court of Appeals for the Sixth Circuit erred in its ruling on qualified immunity and does not argue or show that the Court of Appeals' decision on

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[2] Petitioner argues that the Court of Appeals violated 6th Cir. R. 206(c) in ruling for Respondents on the grounds of qualified immunity because its finding was contrary to the holding of a previous panel of that court in *Gable, supra*. That does not constitute a compelling reason for this Court to grant review; rather, it is an issue to be reconciled by the Court of Appeals for the Sixth Circuit. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 1 L. Ed. 2d 658 (1957). Here, the Sixth Circuit apparently disagreed with Petitioner's contention because it denied his Motion for Rehearing and Suggestion for Rehearing *En Banc*.

that issue was in conflict with decisions of other Courts of Appeal (Sup. Ct. R.10(a)) or in conflict with decisions of this Court (Sup. Ct. R.10(c)).

Petitioner has cited no case in his Petition in which this Court exercised its discretion to grant review under these circumstances. Rather, decisions of this Court indicate that it will not review questions that were not the basis for the decisions below. See, for example, *National Collegiate Athletic Association v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 142 L. Ed. 2d 929 (1999) (" . . . we do not decide in the first instance issues not decided below.").

This Court need go no further to deny the Petition that is before it. However, the following is provided to demonstrate that Petitioner's arguments on the question that he would like to have reviewed are without merit.

II. PETITIONER HAS NOT SHOWN COMPELLING REASONS FOR REVIEW BY VIRTUE OF THE DECISIONS IN *GABLE* OR *SAN FILIPPO*

A. *Gable* And *San Filippo* Are Distinguishable On Their Facts Because Plaintiff's Complaint Does Not Even Mention The First Amendment Or The Petition Clause Of The First Amendment

Plaintiff's Petition is based upon his request that this Court resolve a conflict in decisions of Courts of Appeals. He relies upon *Gable v. Lewis*, *supra*, and *San Filippo v. Bongiovanni, supra*. For the reasons that follow, the rulings in those cases should not cause this Court to grant his Petition.

Petitioner never indicated that he was relying upon the Petition Clause of the First Amendment to the United States Constitution until he filed his Brief on Appeal in the Court of Appeals. Petitioner's Complaint does not even mention the First Amendment, let alone the Petition Clause of that Amendment. This was noted by the district court judge in his Opinion and Order granting Defendants' Motion to Dismiss (Appendix C, p. 13a, n.1).

Only when confronted with Respondents' Motion to Dismiss in the district court did Petitioner invoke the First Amendment in his opposing Brief and in doing so he cited and discussed only cases in which court actions were considered to be forms of expression, i.e. "speech", which was protected by the First Amendment. The district court then correctly applied the "public concern" test to Petitioner's so-called expression in the form of his state court action.[3] Subsequently, having become aware of the Sixth Circuit's decision in *Gable v. Lewis, supra*, in the Court of Appeals Petitioner acted as though he had relied on the Petition Clause of the First Amendment throughout this matter. This was simply not so, and due to Petitioner's tactics in the courts below, Respondents were literally shooting at a moving target.

Focusing solely on Petitioner's Complaint, which Petitioner argues must be accepted as true, it is clear that there is no First Amendment claim. Petitioner's arguments in his opposing district court Brief and in his Brief

[3] In his Petition, Plaintiff does not argue that his state court defamation action involved a matter of public concern. By failing to raise that issue in his Petition, he has conceded that it did not involve a matter of public concern.

on Appeal in the Court of Appeals do not constitute the statement of a claim in a pleading as required by F.R.Civ.P. 8(a).

The plaintiffs in *Gable* and *San Filippo* clearly invoked the First Amendment. Petitioner did not. Therefore, he may not rely upon those decisions.

B. *Gable* Is Distinguishable On Its Facts Because Petitioner's State Court Action Is Not A "Petition"

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Unlike the claimant in *Gable*, this Petitioner in his state court action did not " . . . petition the Government for a redress of grievances". In *Gable*, the plaintiff "had filed with the state agency an official written complaint of sex discrimination in the allocation of the [highway] patrol's automobile towing business" (201 F.3d at p. 770). In her subsequent action founded upon 42 U.S.C. §1983, the plaintiff alleged that she was retaliated against for the filing of that complaint with the state agency.

In his state court action, Petitioner did not petition or ask the government to do anything and did not ask the Michigan state court to grant him any equitable relief regarding any of the terms or conditions of his employment as a physician employed by the University of Michigan.

Rather, he sued three other University employees for defamation (Petition, pps. 2 and 3).

While Respondents concede that authority exists for the proposition that court actions can constitute "petitions", it does not follow that each and every complaint filed in a civil action constitutes a petition. For example, in *San Filippo v. Bongiovanni, supra*, one of the two cases most heavily relied upon by Petitioner, the Court of Appeals for the Third Circuit defined a "petition" as follows:

> . . . when one files a "petition" one is addressing government and asking government to fix what, allegedly, government has broken or failed in its duty to repair.
>
> 30 F.3d at p. 442

In his state court action, Petitioner did not ask the government (or the state court) to fix anything that the government had allegedly broken nor did he allege that the government – i.e. the University – had failed in its duty to repair or rectify any situation relative to his employment. All he asked for was money damages from co-employees for defamation.

The plaintiff in *San Filippo* was a tenured professor at a university. He alleged that he had been retaliated against for numerous grievances and lawsuits that he had instituted, including a state court libel action against three administrators of the university at which he was employed (30 F.3d at pps. 427 and 428). The Third Circuit did not automatically conclude that all of that plaintiff's grievances and lawsuits, which included a libel action, constituted "petitions" entitled to First Amendment protection but remanded the matter to the district court to " . . . consider which, if any, of San Filippo's grievances and

lawsuits constituted a 'petition'" (30 F.3d at p. 443). Therefore, Petitioner's argument that *San Filippo* stands for the proposition that a "petition" is involved whenever a state court suit has been filed or "other formalized grievance mechanism" has been invoked is clearly wrong.

Petitioner suggests that whenever someone uses a "formal mechanism ordained by the government", such as a court suit, automatically and necessarily a "petition" is involved. In other words, Petitioner wants *any* lawsuit about *any* subject to constitute a "petition" protected under the Petition Clause of the First Amendment (Petition, pps. 8 and 14). Petitioner cites no authority to support that proposition. Nor has he cited any authority for the proposition that a garden variety defamation action, such as his state court action against individuals, constitutes a "petition". In his state court action Petitioner did not ask the government to fix anything, much less something that allegedly the " . . . government [had] broken or failed in its duty to repair" (*San Filippo, supra* at p. 442). Rather, in his state court action he merely asked private citizens comprising the jury panel in that matter to award him damages for alleged defamation.

Here, a reading of Plaintiff's Complaint filed in the state court (attached to his Complaint in this action as Exhibit D) makes it clear that Plaintiff's state court action cannot be deemed to be a "petition". Accordingly, this is not an appropriate case in which to review the question presented by Petitioner.

C. *Gable* Is Distinguishable On Its Facts Because Petitioner Is A Public Employee

The plaintiff in *Gable* was a private citizen and, unlike this Plaintiff, was not employed by a public agency. This is a critical distinction because in its decision in *Gable*, the Court of Appeals majority attempted to distinguish *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983) on the grounds that the Supreme Court has not " . . . applied the [public] concern test to citizens who are not governmental employees" (201 F.3d at p. 771).

The importance of the fact that the plaintiff in *Gable* was not a public employee is also highlighted by the fact that the majority in *Gable* also sought to distinguish this Court's decision in *Connick v. Myers, supra*, on the following grounds:

> . . . the reason for the "public concern" test in Connick – to maintain order and avoid disruption in the governmental workplace – does not apply in this case because *the plaintiff was not a governmental employee subject to the discipline of a governmental employer. She was simply a citizen* offering services to a state agency. Since the reason for the test is missing in the present case – maintaining order in the governmental workplace – the test should not be applied here . . . (emphasis added)
>
> (*Id.* at p. 771)

* * *

> . . . there is no basis in our First Amendment jurisprudence for applying *Connick's* public concern test to petitioning activity *by a private businesswoman* who is simply supplying services

> to a governmental agency as an independent contractor. (emphasis added)
>
> (*Id.* at p. 772)

In *Gable*, the Sixth Circuit made no pronouncement of general applicability. Its holding was limited to " . . . the petitioning activity in the instant case." (*Id.* at p. 771).

This Petitioner *is* a public employee and, therefore, the reason for the "public concern" test *does apply* and the rationale for the majority's holding in *Gable* is absent. This is yet another reason that the Sixth Circuit's decision in *Gable* should not cause this Court to grant the Petition before it.

D. The Court Of Appeals For The Sixth Circuit Applies The "Public Concern" Test Where Public Employees Have Complained Of Retaliation For Having Filed Petitions

Since the plaintiff in *Gable* was a private citizen, not a public employee like this Petitioner, the majority did not decide the question presented by Petitioner for review and its discussion of the applicability of the public concern test to petitions filed by public employees[4] is mere *obiter dictum*. It is also incorrect. Where petitions have been filed by public employees, the rule in the Sixth Circuit is consistent with that in seven other Circuits as will be discussed *infra*.

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[4] " . . . we find no authority in the Sixth Circuit limiting petitioning activity by public employees to matters of 'public concern'..." *Gable, supra* at p. 771.

In those cases where a public employee has complained of retaliation on account of having filed a "petition", the Court of Appeals for the Sixth Circuit has applied the "public concern" test. In *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th. Cir. 1989), vacated on other grounds, 497 U.S. 1001, 110 S.Ct. 3232, 111 L. Ed. 2d 744 (1990), the plaintiff was an employee of the Ohio Department of Transportation who filed a reverse discrimination charge against the Department with the Ohio Civil Rights Commission. He then filed an action under 42 U.S.C. §1983, alleging that a decision not to promote him was taken partly in retaliation for his filing of that claim which constituted a violation of the First Amendment. In *Rice*, which was a public employee case, the Court of Appeals noted that the "threshold question" was whether a matter of "public concern" was involved, citing *Connick v. Myers, supra* (887 F.2d at p. 720) and also observed that "not every job related grievance of a public employee is a matter of public concern" (*Id.*). The majority opinion in *Gable* does not discuss or distinguish *Rice*.

In its opinion in *San Filippo v. Bongiovanni, supra*, the Court of Appeals for the Third Circuit even cited the Sixth Circuit's decision in *Rice, supra*, when it listed the decisions of other Circuit Courts of Appeal that had held that complaints, grievances, etc. filed by public employees were not entitled to the protection of the Petition Clause of the First Amendment unless they were addressed to matters of "public concern".

The plaintiffs in *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220 (6th Cir. 1997) were bus drivers employed by a school district. They filed an action against the school district alleging that they had been retaliated against in violation of their First Amendment

right to petition for the redress of grievances because they had filed claims for unemployment compensation benefits. The district court granted the school district summary judgment, and the Court of Appeals for the Sixth Circuit affirmed. In his opinion, Judge Engel concluded that:

> A cause of action for violation of the Petition Clause is subject to the same analysis applied to a claim arising under the Speech Clause. [citations omitted].
>
> * * *
>
> Specifically, the right to petition is limited to matters of public concern. [citations omitted].
>
> 107 F.3d at p. 1226

Notably, Judge Engel cited for these propositions decisions of seven other Circuit Courts of Appeals. Judge Ryan concurred in the result arrived at by Judge Engel but found it unnecessary to apply the "public concern" test because he concluded that the plaintiffs' applications for unemployment compensation were " . . . simply not a 'petition . . . for a redress of grievances' under the First Amendment" (107 F.3d at p. 1232).

In *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000), which was decided by the Court of Appeals for the Sixth Circuit *after* its decision in *Gable v. Lewis*, the plaintiff had been employed by the Michigan Department of Corrections. The plaintiff alleged that during his employment he pursued an internal grievance alleging that he was disciplined because of his race and that he was further disciplined and then terminated in part in retaliation for those complaints. The Court of Appeals stated as follows:

> The Pickering test applied in part III(A) of this opinion governs this analysis as well.
>
> 209 F.3d at p. 608

This was a reference to the threshold determination of whether the grievance involved a matter of "public concern" (209 F.3d at p. 604). Notably, Mr. Perry – like the Petitioner – was a public employee and the Sixth Circuit Panel in *Perry v. McGinnis* did not cite or follow *Gable*, which involved a private individual.

E. The Decision In *San Filippo* Is Incorrect

1. This Court Has Stated That The Free Speech And Petition Clauses Should Be Analyzed In The Same Way

Petitioner argued in the Court of Appeals, without the citation to any authority, that the right to petition the Government must be analyzed separately and independently from the right of free speech because of the punctuation of the First Amendment: the Free Speech Clause is separated from the Petition Clause by a semi-colon (Petitioner's Brief on Appeal, p. 16). If the First Amendment is interpreted and analyzed as Petitioner suggested in the Court of Appeals, then the concluding Petition Clause becomes completely nonsensical because standing alone it contains no language prohibiting Congress from doing anything.

The Sixth Circuit's majority opinion in *Gable, supra,* states: " . . . the petition clause is analytically distinct from, although related to, the free speech clause . . . " (201 F.3d at p. 771). Petitioner and the majority in *Gable* both have disregarded this Court's pronouncement in *McDonald v.*

Smith, 472 U.S. 479, 105 S.Ct. 2787, 86 L. Ed. 2d 384 (1985). The issue in *McDonald* was whether the Petition Clause of the First Amendment provided absolute immunity from an alleged libelous statement although it was well established that the Free Speech Clause of the First Amendment did not afford absolute immunity from such a statement. This Court rejected the attempt to separate the analysis of the Free Speech and Petition Clauses of the First Amendment:

> The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In United States v. Cruikshank, 2 Otto 542, 92 U.S. 542, 23 L. Ed. 588 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." Id., at 522. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789).
>
> 472 U.S. at p. 482
>
> * * *
>
> To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. See Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L. Ed. 2d 426 (1967). These First

> Amendment rights are inseparable, Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L. Ed. 430 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.
>
> 472 U.S. at p. 485

Similarly, in *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L. Ed. 2d 547 (1985), this Court observed:

> Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis [citation omitted].
>
> 470 U.S. at p. 611, n.11

Therefore, the Free Speech and Petition Clauses of the First Amendment are not to be analyzed separately; instead, this Court has made it is clear that they are to be analyzed in the same way. Accordingly, it is completely incorrect to argue that the "public concern" test established by this Court in *Connick* – which is indisputably applicable to an analysis of 42 U.S.C. §1983 claims founded upon the Free Speech Clause of the First Amendment – should not also be applied to claims brought pursuant to that statute but founded upon the Petition Clause of the First Amendment.

2. Seven Other Circuits Have Decided The Same Issue Differently Than The Third Circuit

Besides the fact that decisions of this Court establish that *San Filippo* was incorrectly decided, the Third Circuit's decision is also directly at odds with holdings of

seven other Circuit Courts of Appeals which have concluded that the "public concern" test *is* applicable to the Petition Clause of the First Amendment just as it is applicable to the Free Speech Clause of the First Amendment. The Circuit Courts of Appeals for the Second, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have decided the issue differently than *San Filippo*. See *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993); *Rathjen v. Litchfield*, 878 F.2d 836, 841 (5th Cir. 1989); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Hoffman v. Mayor, Councilmen and Citizens of the City of Liberty*, 905 F.2d 229, 232-233 (8th Cir. 1990); *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220-1223 (9th Cir. 1997), *cert. den.*, 524 U.S. 952, 118 S.Ct. 2368, 141 L. Ed. 2d 737 (1998); *Martin v. City of Del City*, 179 F.3d 882, 889 (10th Cir. 1999); and *Grigley v. City of Atlanta*, 136 F.3d 752, 755-756 (11th Cir. 1998), *cert. den.*, 525 U.S. 819, 119 S.Ct. 59, 142 L. Ed. 2d 47 (1998). In his Petition the Petitioner concedes this overwhelming authority *contra* to the position that he advocates (Petition, pps. 6 and 7). In each of these decisions (except *Rathjen*) this Court's discussion in *McDonald v. Smith, supra*, was cited as part of the rationale for the decision. And, in each of these cases that was decided after the Third Circuit's decision in *San Filippo*, the Courts of Appeals discussed and then expressly declined to adopt the reasoning of the Third Circuit. See *Martin, supra*, at pps. 888-889; *Rendish, supra* at p. 1223; and *Grigley, supra* n.3 at p. 754. In all but one of those decisions (*White Plains Towing Corp., supra*) the plaintiffs were, like this Plaintiff, current or former public employees or officials.

In its decision in *Rendish, supra*, the Ninth Circuit explained succinctly why the Third Circuit's decision in *San Filippo* should not be followed:

> We respectfully disagree with the Third Circuit's analysis. First, it diverges from the Supreme Court's teachings that the primary function of the First Amendment is to facilitate participation in a free political process and that the First Amendment extends its guarantees to public employees in order to encourage such participation. Moreover, it equates the government's conduct as employer with its conduct as government. When government as employer disciplines an employee for pursuing litigation, it does not act as "the very government" which established the mechanism for redress in accordance with its constitutional obligation, but rather in its role as an employer.
>
> 123 F.3d at p. 1223

Gable, on the other hand, involved a claim by a private citizen, not by a public employee. Thus, it is not in conflict with the decisions of the seven other Circuit Courts of Appeals cited above. This Court need not grant the Petition before it for the purported purpose of resolving a conflict between the Sixth Circuit and these seven other Circuits because no such conflict exists. See *Rice, supra; Valot, supra;* and *Perry, supra*.

It is significant that in three of the Court of Appeals decisions that Petitioner concedes have decided the question that he would like to have reviewed against him, this Court denied review. They were *Gray v. Lacke*, 885 F.2d 399 (7th Cir. 1989), *cert. den.*, 494 U.S. 1029, 110 S.Ct. 1476, 108 L. Ed. 2d 613 (1990), *Grigley, supra* and *Rendish,*

supra (Petition, pps. 6 and 7). This Court has had the opportunity in the past to review the question that Petitioner would now like it to review but has declined to do so. Certainly, Petitioner has presented no compelling reasons for this Court to grant review in the circumstances present here.

Nor should this Court grant the Petition in this case in order to reverse the precedent in the Third Circuit resulting from the decision in *San Filippo*. That decision represents a lone voice in the wilderness and the other Courts of Appeals to have considered the question presented for review have decided it correctly. Also, as shown, Petitioner did not plead the First Amendment and his state court action was not a petition. Therefore, the facts make this a completely inappropriate case in which to consider the question presented by Petitioner. If this Court is inclined to bring the Third Circuit into conformity with the other Circuits, this is clearly not the case to use.

III. PETITIONER HAS NOT SHOWN COMPELLING REASONS FOR REVIEW BY HIS RELIANCE UPON THE OTHER CASES CITED IN HIS PETITION

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) is effectively distinguished by Petitioner himself in his Petition (at p. 8): the decision is addressed to the rights of prisoners, not public employees. In *Thaddeus-X*, the issue was " . . . what are the First Amendment Rights retained by prisoners?" (175 F.3d at p. 391). The Sixth Circuit's holding was very narrow ("We hold only that there is no authority for subjecting a prisoner's constitutional right to access to the courts . . . to the public concern limitation described in *Connick v. Myers*".) (*Id.* at p. 392). The Court

of Appeals for the Sixth Circuit contrasted the differences in the relationships between an inmate and the government as a jailor with those of a public employee and the government as an employer (*Id.* at pps. 392-393). The Court of Appeals also noted that to obtain standing to sue a prisoner must allege a personal injury committed against him and that imposition of the "public concern" limitation would eliminate all prisoner suits protected by the First Amendment right of access to the courts (*Id.* at p. 392). Petitioner completely overlooks the statement in *Thaddeus-X* that in the Sixth Circuit causes of action alleging the violation of the Petition Clause of the First Amendment are subject to the same analysis as actions founded upon the Free Speech Clause, i.e. the "public concern test" applies (*Id.* at p. 390, n.6).

The other cases relied upon by Petitioner in his Petition (at p. 9) are also easily distinguishable. *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L. Ed. 2d 405 (1962) does not address the question that Petitioner wants reviewed. In *Button*, this Court concluded that litigation instituted by the N.A.A.C.P. is protected by the First Amendment because it constitutes a form of political expression and involves the right of political association (371 U.S. at pps. 429-431). None of those interests are involved here.

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) is inapplicable. *Vasquez* is a decision of the Seventh Circuit. Petitioner concedes that in the Seventh Circuit the question that he would like reviewed has been decided *against* the position that he advocates by *Gray v. Lacke*, *supra* (Petition, p. 6). See also *Belk v. Town of Minocqua*, *supra*. Further, *Vasquez* involved a claim of denial of access to the courts; the claim was made that a "conspiracy of silence"

by police officers impeded the plaintiffs in attempting to file a civil action since important facts about a crime were deliberately concealed. A claim of retaliation for having brought a prior action was not involved. Ultimately in *Vasquez*, summary judgment was granted for the defendants because the plaintiffs made no allegations that they were prevented from pursing their state court action or that the value of that action was reduced by the cover-up. 60 F.3d at p. 329. Likewise, no such claim is made here by Petitioner regarding his state court action.

Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987) did not involve alleged retaliation against someone for having filed a court action but rather involved an alleged retaliatory prosecution because the plaintiff refused to release civil claims. Like *Vasquez, Haynesworth* also involved an attempt to impede access to the courts and is inapplicable here because it did not involve the question that Petitioner wants reviewed. In *Haynesworth*, the prior action sought to challenge "official misconduct" (820 F.2d at p. 1255) which is not the subject of this Petitioner's state court action for defamation. Also, the First Amendment claim was not truly contested in *Haynesworth* since the appellees did not dispute the plaintiff's contention that " . . . dismissal of criminal charges cannot constitutionally be predicated upon the putative defendant's willingness to release civil claims against public servants . . . " (*Id.*).

Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993), *cert. den.*, 510 U.S. 819, 114 S.Ct. 73, 126 L. Ed. 2d 42 (1993) is also easily distinguishable. First, that is a decision of the Eleventh Circuit and plaintiff concedes in his Petition that the precise issue that he asks this Court to review has been decided *against* him in the

Eleventh Circuit by *Grigley v. City of Atlanta, supra* (Petition, p. 6). Further, the First Amendment issue involved in *Bank of Jackson County* was decided for the defendants on qualified immunity grounds (980 F.2d at p. 1370), which was the basis for the decision of the Sixth Circuit here, and the Court of Appeals for the Eleventh Circuit noted that the connection between the defendants' actions and the plaintiff's First Amendment Rights was "tenuous at best" (*Id.*). In *Bank of Jackson County*, the defendants' conduct did not dissuade the plaintiff from fully litigating its position in other litigation and, likewise, here the Petitioner has not argued that Respondents have done anything to impede the filing or prosecution of his state court defamation action.

Northern Pennsylvania Legal Services, Inc. v. County of Lackawanna, 513 F.Supp. 678 (M.D. Pa. 1981) involves retaliation for engaging in litigation that was arguably protected expression. The underlying litigation which allegedly invoked retaliation consisted of suits on behalf of prisoners challenging alleged constitutional violations and an appeal of the decision by which parental rights of indigents were terminated (513 F.Supp. at p. 681). The district court noted that litigation was a form of expression protected by the First Amendment, i.e. the district court decided the case in reliance upon the Free Speech Clause of the First Amendment, not the Petition Clause.

Westchester Legal Services, Inc. v. County of Westchester, 607 F.Supp. 1379 (S.D. N.Y. 1985) is distinguishable for several reasons. First, it was decided in the Second Circuit, a Circuit in which Petitioner also concedes in his Petition that the very issue that he would like this Court to review has been decided *against* him by *White Plains Towing Club v Patterson, supra* (Petition, p. 6).

Second, like *Northern Pennsylvania Legal Services, supra, Westchester Legal Services* involved alleged retaliation for engaging in litigation that was arguably protected political expression. *Westchester Legal Services* also involved claims of indigent clients to secure their legal rights and the district court specifically found that the non-profit plaintiff "engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public" (607 F.Supp. at p. 1382). Like *Northern Pennsylvania Legal Services, supra*, its focus is upon the Free Speech Clause of the First Amendment. *Westchester Legal Services* did not involve alleged retaliation for seeking redress for purely private matters in a defamation action and is of no utility to Petitioner.

Petitioner suggests that all the cases he has cited support the argument that the right to pursue an action for remedies in a court " . . . is a form of 'petition' " which is protected by the First Amendment (Petition, p. 9). As has been shown, the cases cited by Petitioner do involve that question or support that argument.

CONCLUSION AND RELIEF

For all of these reasons, Respondents request that the Petition be denied.

Respectfully submitted,

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